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No. 08-322

IN THE
Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE,
Appellant,
v.

ERIC HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA, ET AL.,
Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF MEMBERS OF THE TEXAS HOUSE OF REPRESENTATIVES AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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INTEREST OF *AMICI CURIAE*[1]

Amici are forty-four Members of the Texas House of Representatives.[2] They are also all members of the Mexican-American Legislative Caucus (MALC), an identified caucus of the Texas House organized and committed to addressing the issues that Latinos face across the state of Texas. Because Congress extended Section 5 of the Voting Rights Act of 1965 and its inclusive preclearance requirement to Texas in 1975 "due to the state's history of excluding Mexican-Americans from the political process,"[3]

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amici* also represent that all parties have consented to the filing of this brief. Counsel for appellant and all appellees other than the Attorney General have filed letters with the Clerk granting blanket consent to the filing of *amicus* briefs, and a letter reflecting the consent of the Attorney General has been filed with the Clerk.

[2] The Members of the Texas House of Representatives who are joining this brief are listed in the appendix.

[3] Nina Perales, Luis Figueroa & Criselda G. Rivas, *Voting Rights in Texas: 1982-2006*, 17 S. Cal. Rev. L. & Soc. Just. 713, 713-14 (2008); *accord* Janice C. May, Stuart Alexander MacCorkle & Dick Smith, *Texas Government* 57 (8th ed. 1980) ("[W]hen the Voting Rights Act was amended in 1975, Texas was included under Section 5. The amendments added a provision to protect the voting rights of 'language minorities,' which in the case of Texas meant Mexican Americans."). *See also Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 97th Cong. 1866–67 (1981) [hereinafter *VRA Extension Hearings*] (testimony of Hon. Barbara Jordan, Former Member, U.S. House of Rep.) (stating that the primary reason for her advocating the VRA's extension to Texas in 1975 was because

Texas Latinos and the members of MALC have a particular interest in retaining the benefit of Section 5 for Texas and its citizens.

SUMMARY OF ARGUMENT

The judgment below should be affirmed. Section 5 of the Voting Rights Act of 1965 (VRA) performs an important role in ensuring that discrimination in Texas does not infect the voting process. Texas's wide array of special purpose districts provides ample opportunities for discriminatory acts that mirror the widespread discrimination that continues to pervade other aspects of Texas society.

"Texas' long history of discrimination against its black and Hispanic citizens in all areas of public life is not the subject of dispute." *LULAC v. Clements*, 999 F.2d 831, 866 (5th Cir. 1993). Indeed, the history of discrimination in Texas can be told largely through the decisions of this Court and the lower federal courts. This Court has rejected, on many occasions, blatant efforts to oppress Texas's minority citizens in virtually every aspect of public life. *See, e.g.*, *Plyer v. Doe*, 457 U.S. 202 (1982) (rejecting a Texas school district's refusal to educate the children of undocumented Mexican aliens); *White v. Regester*, 412 U.S. 755 (1973) (invalidating two multi-member districts in Texas in light of Texas's long history of discrimination against African-Americans and Mexican-Americans); *Terry v. Adams*, 345 U.S. 461 (1953) (finding violations of the Fifteenth Amendment in discrimination on the basis of race in primary elections not governed by the state); *Sweatt*

"the same tactics used to deny blacks the right to vote prior to 1965 were being used against blacks and Hispanics in Texas and in the Southwest in 1975").

v. Painter, 339 U.S. 629 (1950) (rejecting Texas's attempt to maintain segregated law schools); *Smith v. Allwright*, 321 U.S. 649 (1944) (extending protection against discrimination to primaries when primaries become part of the machinery of general elections).

Just three years ago, this Court invalidated Texas's attempt to redraw a congressional district resulting in Latino vote dilution, *LULAC v. Perry*, 548 U.S. 399 (2006), noting that the redistricting "bears the mark of intentional discrimination that could give rise to an equal protection violation." *Id.* at 440. Several Texas school districts remain under federal court supervision for their recalcitrance to their constitutional obligation to desegregate. *See*, *e.g.*, *Smiley v. Blevins*, 514 F. Supp 1248 (S.D. Tex. 1981). Housing discrimination is so entrenched in some communities that the U.S. Department of Housing and Urban Development (HUD) has assumed control of certain public housing authorities within the state, and law enforcement patterns in many Texas towns continue to reflect racial antagonism. *See* Ross E. Miloy, *HUD Takes Over Agency in East Texas, Citing Bias*, N.Y. Times, Oct. 4, 2000, at A22; Ross E. Miloy, *Arrests by Drug Task Force in Texas Come Under Fire*, N.Y. Times, Apr. 4, 2001, at A14.

In light of that history, the opportunity of minority citizens to participate meaningfully in the election of local governmental officials must be rigorously safeguarded. Local power in much of Texas is wielded by special purpose districts. These districts are pervasive and powerful. They can be created by a few private citizens with relative ease, and their covered population can grow over time—often to the tens of thousands. The governing structure and scope of authority of special purpose districts are flexible and

dynamic, allowing the districts to respond to the changing needs of a growing population.

That flexibility is both a strength and a weakness of special purpose districts. It allows the Texas Legislature to create local governing authorities that can be highly responsive to local needs. At the same time, however, the concentration of dynamic authority in local government officials in an environment still struggling with a history of oppression and discrimination creates a susceptibility to abuse. In such an environment, the importance of continuing oversight to ensure the fairness and integrity of the electoral process cannot be overstated.

ARGUMENT

I. TEXAS RELIES ON SPECIAL PURPOSE DISTRICTS TO FILL LARGE GAPS IN COUNTY GOVERNING AUTHORITY

Texas is a vast state, and only a small percentage of its physical territory is located within city boundaries. *See* Texas Comptroller of Public Accounts, *Demographics – Texas in Focus: Statewide View of Opportunities*, *at* http://www.window.state.tx.us/specialrpt/tif/population.html (last visited Mar. 15, 2009) (noting that 80% of Texas's total land area is rural). The rest of the state, more than 209,000 square miles, is governed by county governments with very limited regulatory, taxing, and eminent domain authority. *See* David B. Brooks, *County and Special District Law*, 35 Texas Practice Series § 1.4 (2d ed. 2008). More than eighteen million people live in these unincorporated areas, and those residents have needs for local services similar to those of urban dwellers. *See* U.S. Census Bureau, *Population Estimates for All Places: 2000 to 2007* (2008), *at* http://www.census.gov/popest/cities/SUB-EST2007-4.

html (linking to spreadsheet showing population estimates for all incorporated areas in Texas). Indeed, many unincorporated areas are contiguous with and indistinguishable from their nearest urban neighbors. In Harris County, for example, a steady exodus of residents from urban areas has resulted in extensive suburban-style developments in both incorporated and unincorporated areas; the population of the latter has now reached 1.38 million out of a Harris County total of 3.9 million. *See* Bill Murphy, *You Can Run, But Can't Hide, From Traffic*, Houston Chron., May 5, 2008, at A1. Accordingly, the Texas Legislature has authorized the creation of more than 3,300 special purpose districts to provide essential infrastructure and governmental services to its citizens living outside city limits. *See* Wilbourn E. Benton, *Texas: Its Government and Politics* 20 (2d ed. 1966).

A. Texas Counties Have Limited Governmental Authority

County government structure in Texas was established by the Constitution of 1876 to meet the needs of a rural agricultural population and has not changed in essential character since that time. There were twenty-three Mexican "municipalities" north of the Rio Grande River at the time of the Texas Revolution. These municipalities became the first twenty-three counties with the adoption of the Republic of Texas's Constitution in 1836. *See* Brooks, *supra*, 35 Texas Practice Series § 1.4. There are now 254 counties in Texas, more than in any other state. The last one—Loving County—was created in 1931. *See* http://www.tshaonline.org/handbook/online/articles/LL/hcl13.html. While the number of counties has grown by a factor of ten since Texas's independence, their delegated authority has remained essentially the same.

Under the Texas Constitution, Texas counties are administrative subdivisions of the state and therefore lack home-rule authority.[4] Tex. Const. art. XI, §§ 1, 2. As such, Texas counties exercise only the limited authority conferred on them by the Texas Constitution and state legislation. That authority remains primarily directed at rural agricultural issues, such as road and drainage construction, the abatement of public nuisances, and the construction and maintenance of reservoirs for irrigation and flood control. Neither the Texas Constitution nor any subsequent legislative enactment confers on counties general land use regulatory authority, the general power of eminent domain, or the general authority to issue bonds and incur debt. Rather, these powers are sparingly assigned to particular counties, or to all counties for a particular purpose. For example, certain border counties were granted limited land use planning authority and the authority to provide water and waste water services to residents in 1989 to combat the proliferation of *colonias* along the Texas-Mexico border. *See* Tex. Loc. Gov't Code Ann. § 412.015. And all 254 counties enjoy the power of eminent domain for the particular purpose of acquiring rights-of-way and other lands necessary to construct reservoirs, dams, levees, wells, canals, or other improvements required for the proper and efficient irrigation of land in the county. *See* Tex. Gov't Code Ann. § 1474.151.

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[4] In 1933, the Texas Constitution was amended to permit counties to initiate home-rule charters. *See* Tex. Const. art. XI, § 3. Thirty-six years later that provision was repealed, without any county having taken advantage of the opportunity to secure home-rule authority.

Moreover, Texas courts have construed even those limited powers narrowly. *See City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 31–32 (Tex. 2003) (holding that counties "have limited authority . . . [and] possess[] only those powers expressly conferred by the Texas Constitution and the Legislature, and those necessarily required to perform their delegated duties"); *see also Crane v. Texas*, 534 F. Supp. 1237, 1244 (N.D. Tex. 1982) ("[C]ounty government provides relatively few direct services to citizens. In addition, their capacity to respond to local needs and desires is limited and those powers are narrowly construed by the courts."), *aff'd in part, rev'd in part on other grounds*, 759 F.2d 412, *amended on denial of reh'g*, 766 F.2d 193 (5th Cir. 1985).

The abilities of Texas counties to provide basic social services to their residents are further limited by the county governing structure created by the Texas Constitution. Every Texas county, regardless of its size, geography, location, or population, functions under the same constitutional restrictions and basic organizational structure. *See* Tex. Const. art. V, § 18 *et seq.* (establishing the commissioners court system of county governance); *Invisible Government: Special Purpose Districts in Texas*, Texas Senate Research Center 2 (2008). Each county is governed by a "commissioners court" composed of a "county judge" and four county commissioners, as well as several other elected county officials, such as the County Clerk and the Tax Assessor-Collector.[5] *See* Tex. Const. art. V, § 18. The commissioners court conducts the general business of the county, but has

[5] The Tax Assessor-Collector is the official voting registrar of the county, while the County Clerk is the chief election officer of the county. *See* Tex. Elec. Code Ann. §§ 12.001, 13.091(1).

no oversight authority over the other elected officials. The lack of central administrative control remains "an inherent problem of county government." Brooks, *supra*, 36A Texas Practice Series § 1.10. Indeed, county government in Texas has been criticized as "obsolete" and "burdened with a 'nineteenth-century political organization.'" *Id.* §§ 1.1, 1.10.

B. Special Purpose Districts Are Created To Provide Services That County Governments Cannot

Texas relies on special purpose districts to fill the gaps in regulatory authority caused by its unique county governance structure. Special purpose districts are quintessentially local and highly specialized. They provide particularized services directly to their members, and target their taxing and regulatory authority to their service population. In general, special purpose districts are "an effective way to keep government at home 'close to the people.'" James A. Hankerson, *Special Governmental Districts*, 35 Texas L. Rev. 1004, 1007–08 (1957).

The attractiveness of special purpose districts has caused Texas to create more such districts, responsible for more government functions, than virtually any other state.[6] In 2007, there were approximately 3,372 special purpose districts in Texas. *See 2007 Census of Governments*, *supra*. While almost one-third of these are Independent School Districts, Texas law authorizes the creation of at least forty-seven

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[6] California and Illinois are the only states that have more special purpose districts than Texas. *See* U.S. Census Bureau, *2007 Census of Governments: Government Organization, Local Governments and Public School Systems by Type and State: 2007*, *at* http://www.census.gov/govs/cog/GovOrgTab03ss.html.

different types of special purpose districts. *See generally* Brooks, *supra*, 35-36A Texas Practice Series.

C. Because They Are Easy To Create, Endowed With Extensive Regulatory Authority, And Extraordinarily Flexible In Size And Scope, Special Purpose Districts Provide Unique Opportunities To Disenfranchise Minority Voters

Special purpose districts are creatures of both constitutional and statutory law. Several provisions scattered throughout the Texas Constitution authorize the creation of special purpose districts. *See*, *e.g.*, Tex. Const. art. III, § 52 (general authority to create special purpose districts), art. XVI, § 59 (conservation and reclamation districts), art. IX, §§ 5, 7-9B, 13 (hospital districts), art. II, §§ 48e, 48f (emergency services districts and jail districts). The districts themselves are then created either by special legislation establishing a particular special purpose district or through a process established in more general statutory provisions defining the governance, structure, and powers of the different types of special purpose districts.

Those special purpose districts that are not created by special legislation often can be created through a petition process initiated by just a few people. To create an Independent School District, for example, a petition containing the signatures of at least 10% of the registered voters in the proposed school district is submitted to the county judge, who then orders an election to approve the creation of the district. *See* Tex. Educ. Code Ann. ch. 13. In a rural area with only ten registered voters, one signature is suf-

ficient to initiate the petition process.[7] Similarly, to create a groundwater conservation district, a majority of the landowners in the proposed district (or fifty landowners, whichever is fewer) may submit a petition to the Texas Commission on Environmental Quality (TCEQ), which then holds a public hearing, certifies that the petition is complete, and sets an election to approve the creation of the district. Texas Commission on Environmental Quality, *What is a Groundwater Conservation District (GCD)?* 1 (2008), *at* http://www.tceq.state.tx.us/assets/public/permitting/watersupply/groundwater/maps/gcd_text.pdf. Municipal Utility Districts (MUDs) are also created by petition process. To create a MUD, landowners submit a petition signed by a majority in value of the holders of land within the proposed district (or fifty landowners, whichever is fewer) to the TCEQ, which evaluates its sufficiency and, if satisfied, grants the petition creating the MUD and appointing five temporary directors. *See* 30 Tex. Admin. Code § 293.11 (2009).

Under each of these petition processes (and similar petition processes applicable to many other special purpose districts), residents of a sparsely settled region can successfully create a special purpose district with just a few signatures and, if applicable, a few additional votes in the approval election. In 2008, for example, the Roberts County Fresh Water Supply District (RCFWSD) was created by a petition signed

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[7] While this demographic may seem implausible, the inhospitable West Texas landscape renders this scenario commonplace. Roberts County, Texas, for example, covers 924 square miles and boasts 900 residents—fewer than one resident per square mile. *See* Susan Berfield, *There Will Be Water*, BusinessWeek, June 23, 2008, at 40.

by one (corporate) landowner—Mesa Water Company. The only five residents on the land covered by the district were named as the district's directors, and the district's creation was approved by unanimous vote of the two eligible voters. The RCFWSD covers only eight surface acres, but provides access to the Ogallala Aquifer containing millions of dollars worth of groundwater subject to the common-law rule of capture. *See* Berfield, *supra*, at 42. Indeed, appellant Northwest Austin MUD No. 1 was created after an election in which just two ballots were cast in 1986. *See* JA 394–95.

The range of services provided by the different types of special purpose districts is broad—from services as fundamental as education, electricity, water, and wastewater, to those as esoteric as mosquito and wind erosion control.[8] And the regulatory authority of such districts is as broad as the scope of the services themselves. While some special purpose districts merely promote certain policies and have very limited governmental powers,[9] many possess or can acquire extensive taxing, regulatory, debt issuance, and eminent domain authority.

In fact, many special purpose districts enjoy broad governing authority more closely resembling that of a

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[8] *See* Tex. Educ. Code Ann. § 22.12 (common school districts); Tex. Water Code Ann. §§ 51.012–51.013 (water control and improvement districts); Tex. Health & Safety Code Ann. § 344.001 (mosquito control districts); Tex. Agric. Code Ann. § 202.011 (wind erosion districts).

[9] Soil and Water Conservation Districts, for example, have no authority to levy taxes, impose and collect assessments, issue bonds, or acquire property through condemnation. They are created to promote conservation land use practices for the benefit of the "farm and grazing lands of the State of Texas." Tex. Agric. Code Ann. § 201.001.

home-rule city than a subdivision of the state. MUDs provide a good example. MUDs are generally created to provide water and wastewater services to new developments in unincorporated areas.[10] They enjoy expansive authority to undertake virtually any measure necessary to supply water, collect and dispose of waste, control local storm water, irrigate land, alter land elevation, and navigate coastal and inland waters. *See* Tex. Water Code Ann. §§ 54.201(b), § 54.203. MUDs can create and maintain recreational facilities, including parks, landscaping, trails, beautification projects, street lighting, and equipment. *See id.* §§ 49.462-49.463. The Texas Constitution authorizes MUDs to engage in fire-fighting activities and to issue bonds for that purpose. *See* Tex. Const. art. XVI, § 59f. MUDs can acquire interests in "land, materials, waste grounds, easements, rights-of-way, equipment, contract or permit rights or interest," either inside or outside district lines. Tex. Water Code Ann. § 49.218(a). In 1995, MUDs acquired the power of eminent domain over any land, easement, or other property inside or outside the district boundaries necessary for its projects or purposes. *See id.* § 49.222(a). MUDs can issue bonds to repair and maintain roads. *See id.* § 54.522. They may also collect necessary charges and fees in addition to collecting property taxes. *See id.* §§ 49.107, 49.212, 49.231. Finally, MUDs can contract for peace officers, including police officers, with power to make arrests to enforce the laws of the district and the state. *See id.* § 49.216.

Independent School Districts also wield substantial regulatory authority over residents. The board of

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[10] In 2002 there were more than 575 MUDs in Texas. *See* Brooks, *supra*, 36A Texas Practice Series § 46.71.

trustees of the school district is authorized to adopt rules and bylaws necessary to carry out the duties of the district. *See* Tex. Educ. Code Ann. § 11.151. The board may issue bonds and assess taxes, *see id.* § 11.1511, sell mineral rights, *see id.* § 11.153, and donate land, *see id.* § 11.1541. And school districts can exercise the right of eminent domain to secure sites on which to construct school buildings or for any other purpose necessary for the district. *See id.* § 11.155.

Special purpose districts in Texas wield this extensive power on behalf of their resident members, which can range from as few as one person to as many as hundreds of thousands of people.[11] More commonly, special purpose districts start small and grow over time, easing their creation by limiting participation to just a few members, and maximizing their effectiveness over time by serving many more.

Thus, the very characteristics that make special purpose districts so efficient and effective—ease of creation, flexibility in governance, extensive governing authority, and intensively local control—provide incentives and opportunities for abuse. In a state like Texas, which is still emerging from a long history of discrimination and electoral exclusion (see *infra* Part II), it makes little sense to permit these special purpose districts to bail out of judicial oversight intended to ensure that power is not consolidated at the expense of underrepresented minorities.

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[11] The Houston Independent School District, for example, serves more than 200,000 students. *See* Houston Independent School District, *Facts & Figures* 1 (2007), *at* https://www.houstonisd.org/HISDConnectEnglish/Images/PDF/FactsFigures07.pdf.

II. DISCRIMINATION CONTINUES TO PERVADE ALL ASPECTS OF TEXAS SOCIETY GOVERNED BY SPECIAL PURPOSE DISTRICTS

Much of the discrimination that required passage of the Voting Rights Act (VRA) continues to this day in Texas. Such discrimination is prevalent in special purpose districts, which have significant potential to affect the everyday lives of residents due to the important role such districts play in local government in Texas. As seen in the sheer number of voting rights objections, the VRA continues to play an important role in combating the discrimination that so clearly pervades all aspects of society—including education, housing, and law enforcement.

A. The Voting Rights Act Continues To Play A Vital Role In Texas, In Particular With Regard To Special Purpose Districts

Section 5 of the VRA remains critically important civil rights legislation in the political landscape of Texas, and its preclearance procedures remain necessary to ensure equal franchise to all Texas residents, particularly racial and language minorities. *See* Perales, 17 S. Cal. Rev. L. & Soc. Just. at 713; *see also Quiet Revolution in the South: The Impact of the Voting Rights Act* 1965–1990, at 255 (Chandler Davidson & Bernard Grofman eds., 1994) [hereinafter *Quiet Revolution*]. In the first six years following Congress's extension of Section 5 to Texas, "Texas received more letters of objection than any state covered under Section 5 for 16 years." *VRA Extension Hearings*, *supra*, at 1877 (prepared statement of Vilma S. Martinez, President and General Counsel, Mexican American Legal Defense and Educational Fund).

Moreover, "[b]etween the time Texas was brought under section 5 coverage in 1975 and December 1990, the Justice Department interposed 131 objections to voting procedures in the state," with many of these objections being raised with respect to "multiple infractions of voting law within a single jurisdiction." *Quiet Revolution*, *supra*, at 246. As several observers have commented, these infractions "embraced the spectrum of illegal procedures: racial gerrymandering, discriminatory purges of registered voters, imposition of numbered posts and the majority runoff requirement, annexations that diluted minority votes, a faulty bilingual oral assistance program, reduction in the number of elected officials, transfer of duties from one official to another, and unfair changes in election dates." *Id.*; *see also* Perales, *supra*, 17 S. Cal. Rev. L. & Soc. Just. at 728. Nearly 40% of those objections have been lodged against changes in voting procedures proposed by special purpose districts like MUDs. *See* U.S. Dep't of Justice, *Section 5 Objection Determinations: Texas*, *at* http://www.usdoj.gov/crt/voting/sec_5/obj_activ.php (last visited Mar. 6, 2009) (showing that, of DOJ's 201 Section 5 objections since 1975, seventy-five were aimed at changes proposed by special purpose districts).

Finally, Section 5 continues to have a strong deterrent effect in Texas. Since 1982, Texas has had the largest number of Section 5 submissions withdrawn by jurisdictions after the DOJ objected and also "the largest number of electoral changes deterred by MIRs ["More Information Requests"], with 366 changes either withdrawn, changed, or dropped since 1982." Perales, *supra*, 17 S. Cal. Rev. L. & Soc. Just. at 730–31 ("Section 5 plays a critical role in protecting minority voters—even when state officials are

recalcitrant and fail to comply with it. However, Texas's failure to comply with Section 5 also shows that the state has a long way to go before it fully ensures equal voting opportunities to all of its voting-age citizens."). As one author observed, "one can only speculate about the number of discriminatory changes that would have occurred but for the deterrent effect of section 5." *Quiet Revolution*, *supra*, at 246.

The long history of voter discrimination in Texas, as well as the frequency of Section 5's use in Texas as compared to other covered jurisdictions, all support the conclusion that Section 5 is as pertinent as ever to the state, particularly in the context of voting changes proposed by special purpose districts like appellant. That need is particularly great because discrimination continues to infest the core activities that underlie the vast bulk of special purpose districts in Texas.

B. Texas Independent School Districts Continue To Discriminate Against Minorities On The Basis Of Language And Race

Independent School Districts (ISDs) are among the most significant special purpose districts in Texas. Approximately 1,400 ISDs have been chartered in the state. *See* Nikki Weingarten, *Schools Still Trying to Rid Themselves of Segregation Label*, Digital Journal, Jan. 12, 2009, *at* http://www.digitaljournal.com/article/265051. Ranging from huge urban districts serving almost a quarter of a million students to small rural districts with one high school, they bear the critical responsibility of educating the state's primary and secondary students. *Compare* Houstonisd.org, *2009 Facts and Figures*, *at* http://www.houstonisd.org/HISDConnectDS/v/index.jsp?vgnextoid=62c6757761efc010VgnVCM10000052147fa6RCRD

&vgnextchannel=2e2b2f796138c010VgnVCM10000052147fa6RCRD (last visited Mar. 22, 2009) (reporting that Houston Independent School District had 200,225 students enrolled in the 2008–2009 school year), *with* Cottoncenterisd.org, *2006–2007 Academic Excellence Indicator System*, *at* http://www.cottoncenterisd.org/public%20Docs/Academic%20Excellence.pdf (last visited Mar. 22, 2009) (reporting that Cotton Center Independent School District had only 161 total students in the 2006–2007 school year). Across the state, these special purpose districts continue to struggle with their obligations to offer this education in a nondiscriminatory manner.

That struggle is chronicled in the Federal Reports. In the past half century, the state itself and virtually every major school system within its borders have been found by a court to have operated a racially dual system of education. *See*, *e.g.*, *United States v. Texas Educ. Agency*, 467 F.2d 848 (5th Cir. 1972) (Austin); *Houston Indep. Sch. Dist. v. Ross*, 282 F.2d 95 (5th Cir. 1957); *Borders v. Rippy*, 247 F.2d 268 (5th Cir. 1957) (Dallas); *United States v. Texas*, 321 F. Supp. 1043 (E.D. Tex. 1970) (state-wide), *aff'd*, 447 F.2d 441 (5th Cir. 1971); *Flax v. Potts*, 204 F. Supp. 458 (N.D. Tex. 1962) (Fort Worth), *aff'd*, 313 F.2d 284 (5th Cir. 1963). In 1970, a federal court declared that Texas ISDs were responsible for creating and maintaining dual school systems and that "the vestiges of racially segregated public education" had not been eliminated in the state. *United States v. Texas*, 321 F. Supp. at 1058. As a result, the court entered an extensive desegregation decree that is still in effect in Texas today. *See United States v. Texas*, No. 6:71-CV-5281 (E.D. Tex. Dec. 17, 2008) (affirming the ongoing need for a federal order requiring Texas independent school districts to deseg-

regate); *see also United States v. Edgar*, 404 U.S. 1206, 1207 (1971) (Black, Circuit Justice) (upholding the original order, stating that "it would be very difficult for me to suspend the order of the District Court that, in my view, does no more than endeavor to realize the directive of the Fourteenth Amendment and the decisions of this Court that racial discrimination in the public schools must be eliminated root and branch").

Although Texas has made great strides in eradicating discrimination in its schools, significant problems persist. Nine school districts in the state remain under a federal court order to desegregate. *See* Rhiannon Meyers, *Galveston Schools May Be Declared Desegregated After 50 Years*, Khou.Com, Jan. 8, 2009, *at* http://www.khou.com/news/local/galveston/stories/khou090108_tnt_galveston-desegregation.5baa697.html; Nikki Weingarten, *Schools Still Trying to Rid Themselves of Segregation Label*, Digital Journal, Jan. 12, 2009, *at* http://www.digitaljournal.com/article/265051.

Moreover, even the "unitary" school districts in Texas may not have entirely eradicated their past discriminatory practices. *See*, *e.g.*, *Samnorwood Indep. Sch. Dist. v. Texas Educ. Agency*, 533 F.3d 258, 260 (5th Cir. 2008) (holding that Court Order 5281 did not apply to the plaintiff school district not because there was a finding of no discrimination in the school district, but because it was not a party to the original lawsuit). And some districts have avoided court intervention not because of the absence of discrimination, but because a court found no practical remedy available to eliminate all vestiges of discrimination. *See*, *e.g.*, *Ross v. Houston Indep. Sch. Dist.*, 699 F.2d 218, 224, 228 (5th Cir. 1983); *Flax v. Potts*, 725 F. Supp. 322, 330 (N.D. Tex. 1989), *aff'd*

and remanded, 915 F.2d 155 (5th Cir. 1990). Such districts continue to face litigation.

The VRA remains an important tool, in addition to the enforcement of substantive constitutional rights, in the ongoing efforts to ensure equal educational opportunity for all Texans. Of the nearly 200 objections raised under Section 5 of the VRA in Texas, 65 of them have involved ISDs. *See* DOJ.gov, *About Section 5 of the Voting Rights Act*, *at* http://www.usdoj.gov/crt/voting/sec_5/tx_obj2.php (last visited Mar. 12, 2009). And, in 2003, a federal district court in Texas denied the Dallas ISD's motion to dismiss a Section 5 suit filed by language-minority plaintiffs who claimed that the school district had implemented a discriminatory redistricting plan without preclearance. *See Villegas v. Dallas Indep. Sch. Dist.*, No. 302CVO858R, 2003 WL 22573921, at *10 (N.D. Tex. Oct. 17, 2003). The court held that it could "not conclude beyond doubt that DISD secured preclearance of the majority Hispanic voting age requirement." *Id.*

Indeed, as recently as 2003, this Court recognized the ongoing importance of the narrowly tailored use of race as an admissions criterion for law schools. *See Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (overruling *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996)). As Justice Ginsburg observed in her concurrence, "[c]onscious and unconscious race bias, even rank discrimination based on race, remain alive in our land." *Id.* at 345.

C. Discrimination Against Minorities In Housing—Both Public And Private—Persists In Texas

Minority residents in Texas have faced continuous and systematic discrimination in public housing. In 1982, a federal district court certified a class-action

lawsuit alleging racial discrimination in public housing and ordered 36 counties in Texas to desegregate housing projects. *See Young v. Pierce*, 544 F. Supp. 1010 (E.D. Tex. 1982). In 1988, the court revisited the issue and found that conditions not only had failed to improve, but also had deteriorated in some instances: "In more than two years since the liability finding in this action, five [public housing authority (PHA)] sites, formerly racially mixed, have regressed to single-race status. Four new PHA-operated sites were either completely or predominantly one-race projects. Thirty-two PHAs continue to have 100% one-race sites. In addition to the PHAs already mentioned, fourteen continue to operate predominantly one-race sites." *Young v. Pierce*, 685 F. Supp. 975, 978–79 (E.D. Tex. 1988) (citations omitted).

This is not an isolated example. In 1993, the town of Vidor became an all-white enclave when the city's last African-American residents—who were relocated to the area in response to the class-action lawsuit—decided to leave after growing weary of harassment and racial epithets. *See Weary of the Hostility, A City's Blacks Will Go*, N.Y. Times, Aug. 29, 1993, § 1, at 24. As a result, HUD assumed control of the Orange County Housing Authority in Vidor, the first time HUD had ever taken over a housing authority based on civil rights violations. *See Texas Project Is Seized After HUD Finds Bias*, N.Y. Times, Sept. 15, 1993, at A20. In 2000, HUD was again forced to assume control of a local public housing authority, this time in Beaumont, citing a demonstrated pattern of racial discrimination dating back to the 1960s. *See* Ross E. Miloy, *HUD Takes Over Agency in East Texas, Citing Bias*, N.Y. Times, Oct. 4, 2000, at A22. Explaining HUD's decision, Housing Secre-

tary Andrew Cuomo stated, "There's no question as to the existence of discrimination, there's no question that it's been going on for decades. The only question is, when do you say, 'Enough is enough?'" *Id.*

Nor is housing discrimination in Texas limited to its public housing authorities. Zoning ordinances historically relegated minority residents to less desirable neighborhoods. *See*, *e.g.*, *Liberty Annex Corp. v. City of Dallas*, 289 S.W. 1067, 1067 (Tex. Civ. App. 1926) (finding unconstitutional a Dallas ordinance that relegated residences of "the colored race" to certain areas of town), *aff'd*, 295 S.W. 591, 592 (Tex. Com. App. 1927). The practice continues, albeit less blatantly, today. For example, 2003 amendments to the zoning and subdivision ordinances in Kyle, Texas, require that all new single-family construction meet certain heightened standards for garage size, overall square footage, type of exterior, and lot size. *See NAACP v. City of Kyle*, No. A-05-CA-979 LY, 2006 WL 1751767, at *1 (W.D. Tex. June 16, 2006). The NAACP, joined by several other organizations, brought suit under the Fair Housing Act, alleging that the city's ordinances had the effect of raising the average cost of a starter home by 38%, thereby excluding minorities from being able to live in the city. *Id.* The pleadings survived a motion to dismiss, and the case is currently pending. *Id.* at *5.

D. Discriminatory Law Enforcement Remains A Problem In Texas

The notorious events in Tulia ten years ago provide a potent reminder that minority Texans remain strikingly vulnerable to the frightening prospect of the racially motivated abuse of police and prosecutorial power. In 1999, forty-six African-Americans (nearly 10% of Tulia's African-American residents)

were arrested on drug-related charges based solely on the fabricated testimony of a white deputy sheriff who had purportedly conducted an undercover investigation. *See Coleman v. Texas*, 246 S.W.3d 76, 80 (Tex. Crim. App. 2008). Notwithstanding the complete absence of physical or wiretap evidence against the suspects, all but eight of those arrested were convicted, through either guilty pleas or jury verdicts. *Id.* Many were sentenced to more than 90 years in prison. *Id. See also* Bob Herbert, *Kafka in Tulia*, N.Y. Times, July 29, 2002, at A19.

Public outcry led to intense national scrutiny of the events in Tulia, including a documentary film detailing the miscarriage of justice. *See* Tulia, Texas Documentary Website, *at* http://www.tuliatexasfilm.com/ (last visited Mar. 23, 2009). In 2003, Governor Perry granted pardons to all 35 remaining Tulia defendants. *See* Press Release, Office of Governor Rick Perry, *Gov. Perry Grants Pardons to 35 Tulia Defendants* (Aug. 22, 2003). The governor determined that "a review by the trial court concluded that the key witness in the Tulia cases, an undercover agent, was not credible and withheld important evidence from the defense." *Id.* Several years later, the deputy sheriff was convicted of aggravated perjury for his testimony in the joint evidentiary hearing regarding the habeas petitions of several of the original defendants. *See Coleman*, 246 S.W.3d at 79.

Stories of discrimination by local law enforcement in Texas continue to make national news. Minority residents of Tenaha, Texas, have filed a class-action lawsuit alleging that local officials have unconstitutionally perverted the Texas asset-forfeiture law's intent by targeting minority residents and funding local law enforcement with the proceeds from seized

assets. *See* Plaintiffs' First Am. Compl., *Morrow v. City of Tenaha Deputy City Marshall Barry Washington*, No. 2:08-CV-288 (E.D. Tex. filed Nov. 3, 2008); *see also* Howard Witt, *Highway Robbery? Texas Police Seize Black Motorists' Cash, Cars*, Chi. Trib., Mar. 10, 2009, at 4. The complaint alleges that local law-enforcement officers have threatened motorists with prosecution to induce them to sign over the possessions they have with them—sometimes even their cars. More than 140 motorists in Tenaha agreed to surrender possessions after being threatened with prosecution—in one case police even threatened to seize children and place them in foster care—between June 2006 and 2008. In response to these claims, the Texas Legislature has proposed changes to the asset-forfeiture law requiring more accountability and oversight in the seizing of assets. *See* S.B. 1529, 81st Leg., Reg. Sess. (Tex. 2009).

Although extraordinary, the events in Tulia and Tenaha are not isolated. Since the Tulia raid, other Texas law-enforcement efforts have failed under similar circumstances. *See* Ross E. Miloy, *Arrests by Drug Task Force in Texas Come Under Fire*, N.Y. Times, Apr. 4, 2001, at A14 (discussing a state prosecutor's dismissal of charges against seventeen African-Americans after the single informant responsible for most of the arrests failed several polygraph tests). Residents of South Texas claim that Hispanic minorities driving near the Mexican border have been the targets of stops and seizures similar to those occurring in Tenaha. Media reports suggest that local law-enforcement offices in the Rio Grande Valley have come to rely on money from the raids for funding, and officers therefore target motorists carrying money into Mexico, rather than motorists who might

be carrying drugs into the United States. *See* Lisa Sandberg, *Property Seizures Seen as Piracy*, San Antonio Express-News, Feb. 7, 2009, at A1.

These incidents of discrimination are especially problematic in light of the localized control over law enforcement. When pockets of such discrimination persist in communities, the effects can be pervasive.

E. Racially Motivated Violent Crime Persists In Texas

Vigilante racial violence in Texas's history is well documented. *See generally* John R. Ross, *Lynching*, The Handbook of Texas Online, *at* http://www.tshaonline.org/handbook/online/articles/LL/jgl1.html (last visited Mar. 23, 2009) (noting that Texas stands third among the states, after Mississippi and Georgia, with a total of 468 documented lynchings, the last occurring as recently as 1942). One of the most gruesome examples of hate-based violence in Texas, however, took place not during the 1930s or 1940s, but just over a decade ago when James Byrd, Jr. was dragged to his death behind a pickup truck driven by three white supremacists. *See* Carol Marie Cropper, *Black Man Fatally Dragged in Possible Racial Killing*, N.Y. Times, June 10, 1998, at A16.

Although Byrd's brutal murder was an isolated instance of extreme racial animosity, current events frequently stir memories and renew racial tensions. In September 2008, Brandon McClelland was killed when his skull was crushed and he was dragged 40 feet beneath a pick-up truck in Paris, Texas. *See* James C. McKliney, Jr., *Killing Stirs Racial Unease in Texas*, N.Y. Times, Feb. 14, 2009, at A22. Because the suspects in that case were friends with the victim, police do not believe that the crime was racially motivated. Nonetheless, the murder's gruesome imagery

has served as the catalyst for complaints of systemic racial discrimination from Paris's minority residents. *Id*. For example, Shaquanda Cotton, a 14-year-old African-American, was sentenced to seven months in a state juvenile correction facility for pushing a hall monitor at school. Three months earlier, the same judge had sentenced a 14-year-old white girl to probation for burning down her family's house. *Id.* Racial discontent in Paris has escalated to the point that the DOJ recently sent Community Relations Service (CRS) moderators to the town. *Id*. The CRS was created by the Civil Rights Act of 1964 to serve as the DOJ's "'peacemaker' for community conflicts and tensions arising from differences of race, color, and national origin." U.S. Dep't of Justice, *USDOJ: Community Relations Service*, *at* http://www.usdoj.gov/crs/ (last visited Mar. 23, 2009).

III. CONTINUED COVERAGE OF THE VOTING RIGHTS ACT—ESPECIALLY OVER SPECIAL PURPOSE DISTRICTS—IS ESSENTIAL TO ENSURING THAT MINORITY TEXANS CAN PARTICIPATE MEANINGFULLY IN LOCAL GOVERNANCE

Given the vast powers that special purpose districts may exercise in Texas, the ease with which such districts can be created, and their ability to expand their authority and covered population over time (*see supra* part I), the potential for these districts to bail out of the VRA raises special concerns.

The saga of the Roberts County Fresh Water Supply Company provides a clear illustration of the ease with which special purpose districts may form and accrete substantial power, as well as the potential implications for minority voting rights and the importance of ongoing federal supervision pursuant

to the VRA. In 2007, well-known businessman T. Boone Pickens arranged for one of his employees and the employee's wife to move onto several acres of Pickens's land to initiate the petition process required to create the Roberts County Fresh Water Supply District (RCFWSD). The eventual goal of this district was to pipe water from the Ogallala Aquifer some 200 miles from rural West Texas to Dallas. *See Roberts County Fresh Water Supply District created*, The Cross Section (The High Plains Underground Water Conservation Dist. No. 1, Lubbock, Texas), Nov. 2007, at 4; Berfield, *supra*, at 44-45. While the district was being created, the Texas Legislature enacted two statutes that were crucial to the success of Pickens's venture: one that expanded the eminent domain powers of groundwater conservation districts outside their boundaries, and one that permitted property owners within a district (rather than just resident voters) to serve on the district's board of directors. *See* Berfield, *supra*, at 44-45. With the passage of this legislation, the eight-acre district, created on a 2-0 vote and headed by a five-member board composed entirely of Pickens's employees, soon became a fully fledged groundwater conservation district—complete with the power to exercise eminent domain over the proposed pipeline's right of way (including land outside the district's boundaries) and to issue up to $101 million in bonds to finance its activities. *Id.* The DOJ, however, has entered an objection to the legislation that changed the criterion for board membership, because the state failed to demonstrate that the change would not have a retrogressive effect on minority voting rights. *See* Letter from Grace Chung Becker, Acting Assistant Attorney General, Civil Rights Division, DOJ, to Phil Wilson, Texas Secretary of State (Aug. 21, 2008).

While the RCFWSD acted swiftly to accumulate power and restructure its governing board, other special purpose districts may do so more slowly. If these districts are permitted to bail out of the VRA after ten years of relative inactivity, they may then change essential character in a way that permits discrimination. The Garland ISD is an example of the dangers this could present. Garland ISD is now the twelfth-largest ISD in the state and has an enrollment of more than 57,000 students. Garland ISD—along with eight other ISDs in Texas—remains under a federal court order to desegregate and continues to operate a school-choice plan designed to comply with a decision finding its enrollment practices discriminatory. The district was formed in 1901, just after the 1900 census had counted 809 residents in the town of Garland. Ten years later, Garland's population had fallen to 804. By the time it began court-mandated desegregation, however—69 years after the Garland ISD's tenth birthday—81,437 people lived in Garland. Just as the Garland ISD's record for running elections fairly could not have been evaluated ten years after its creation, it makes little sense to apply a ten-year bail-out provision to special purpose districts that can remain essentially dormant for their first ten years and then acquire extensive regulatory powers and substantial populations, while remaining exempt from federal oversight of their election processes.

The Garland ISD is hardly unique. Many of Texas's special purpose districts are created to serve small populations with the understanding that they may (or even the expectation that they will) eventually grow much larger. Dozens of suburban ISDs in Texas currently serve only a few thousand residents

but have the potential to become large school districts as demographics change during the next ten to twenty years. *See*, *e.g.*, Lindsay Kastner, *Suburban Schools: Big Growth: No End Soon to Soaring Enrollments*, San Antonio Express-News, May 25, 2008, at 1B (reporting on burgeoning growth in suburban school districts near San Antonio). Nor is the phenomenon limited to school districts. As this case readily demonstrates, MUDs often are established to cover planned residential developments well before a permanent population of any kind is in place.

It makes little sense to permit these districts to bail out of Section 5 coverage after ten or more years of operation serving a small, homogeneous population. The potential for districts to begin as small, homogeneous limited purpose entities and transform into large, diverse, powerful local governments renders a ten-year history of non-discrimination by entities such as the Northwest Austin Municipal Utility District No. 1 irrelevant to concerns about minority disenfranchisement in the future. Indeed, the fact that special purpose districts can and do change so dramatically over time validates Congress's decision to limit the bail-out provision to larger, more stable, political subdivisions such as cities and counties. Special purpose districts should not be permitted to bail out of the Section 5 provisions that have successfully shielded so many minority Texans from electoral misconduct in the past.

CONCLUSION

The judgment of the three-judge district court should be affirmed.

Respectfully submitted,

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March 25, 2009

APPENDIX

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Joining *Amicus* Brief in Support of Appellees in
Northwest Austin Municipal Utility District
Number One v. Holder, et al.

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Carol Alvarado, Member of the Texas House of Representatives for District 145;
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Rafael Anchía, Member of the Texas House of Representatives for District 103;
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Joseph E. Moody, Member of the Texas House of Representatives for District 78;
Member, Mexican-American Legislative Caucus

Elliott Naishtat, Member of the Texas House of Representatives for District 49;
Member, Mexican-American Legislative Caucus

Rene O. Oliveira, Member of the Texas House of Representatives for District 37;
Member, Mexican-American Legislative Caucus

Dora Olivo, Member of the Texas House of Representatives for District 27;
Member, Mexican-American Legislative Caucus

Solomon Ortiz Jr., Member of the Texas House of Representatives for District 33;
Treasurer, Mexican-American Legislative Caucus

Aaron Peña, Member of the Texas House of Representatives for District 40;
Member, Mexican-American Legislative Caucus

Joe Pickett, Member of the Texas House of Representatives for District 79; Member,
Mexican-American Legislative Caucus

"Chente" Quintanilla, Member of the Texas House of Representatives for District 75;
Member, Mexican-American Legislative Caucus

Richard Peña Raymond, Member of the Texas House of Representatives for District 42;
Member, Mexican-American Legislative Caucus

Tara Rios Ybarra, Member of the Texas House of Representatives for District 43;
Member, Mexican-American Legislative Caucus

Eddie Rodriguez, Member of the Texas House of Representatives for District 51;
Member, Mexican-American Legislative Caucus

Patrick M. Rose, Member of the Texas House of Representatives for District 45;
Member, Mexican-American Legislative Caucus

Michael Villarreal, Member of the Texas House of Representatives for District 123;
Member, Mexican-American Legislative Caucus

Armando Walle, Member of the Texas House of Representatives for District 140;
Member, Mexican-American Legislative Caucus